Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ROGER J. WOO,
Petitioner,

v.

PENNSYLVANIA,
Respondent.

Petition for Writ of Certiorari to the Superior Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

ROBERT L. STEWART *
1710 Lawyers Building
428 Forbes Avenue
Pittsburgh, PA 15219
(412) 471-1957
Counsel for Petitioner Roger J. Woo

* Counsel of Record

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QUESTIONS PRESENTED FOR REVIEW

I. Whether *Davis v. United States*, 512 U.S. 452 (1994), and its elimination of any requirement that interrogating officers ask clarifying questions in response to an ambiguous request for counsel, should be reexamined.

II. Whether it comprises interrogation under *Rhode Island v. Innis*, 446 U.S. 291 (1980) for a police officer to ask an arrestee, "what's bothering you?"

III. Whether fresh warnings are required under *Miranda v. Arizona*, 384 U.S. 436 (1966) following changes in the circumstances of custodial interrogation and a significant lapse in time?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. ———

ROGER J. WOO,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

Petition for Writ of Certiorari to the Superior Court of Pennsylvania

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PETITION FOR WRIT OF CERTIORARI

Petitioner Roger Jiunnming Woo respectfully requests that a writ of certiorari issue to review the judgment of the Superior Court of Pennsylvaia entered on April 22, 1997. Discretionary review was denied by the Pennsylvania Supreme Court on December 31, 1997. 25a.

OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania, which was not reported, is reproduced in the Appendix at 1a. The trial court's unpublished opinion is reproduced at 13a of the Appendix.

JURISDICTION

The jurisdiction of this Court to review a final state court judgment is invoked under 28 U.S.C. § 1257. The judgment of the Superior Court of Pennsylvania was entered on April 22, 1997. Petition for Allowance of Ap-

peal was timely filed with the Supreme Court of Pennsylvaia and was denied by Order entered December 31, 1997. 25a.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

United States Constitution, Amendment XIV, Section 1.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Petitioner Roger Jiunnming Woo was convicted of first degree murder in the death of his fiancee, Sherri Lynn Aukerman, and sentenced to life imprisonment. 24a. Aukerman was shot in the head at close range following a round of target shooting with Woo in a wooded area of Westmoreland County, Pennsylvania. Immediately after the shooting Woo ran to a nearby road and summoned help from a passerby, explaining that Aukerman had been "playing around" with the gun, that she had pointed it at her head, that Woo had grabbed her arm, and that the gun had discharged. Aukerman died several hours later at a local hospital.

Within a week of the shooting Woo called the state police and requested that they pick up a handgun he had purchased, stating that he had received information that the gun might have been stolen. When they arrived at Woo's residence to retrieve the gun, the troopers gave Woo the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), had him sign a waiver form and then

proceeded to question him about Sherri Aukerman's death. Woo told the officers that he and Aukerman had been plannig to marry and that the shooting was accidental.

The troopers asked Woo if he would submit to a polygraph examination, explaining that the results of the test could not be used against him. According to the troopers, Woo replied that, "If I have to do it, I will." He was taken by the troopers to the state police barracks, arriving at approximately 1:30 p.m. Prior to the pre-test interview he was again given *Miranda* warnings and questioned about the shooting, which he again described as accidental.

While the polygraph was being administered, the officer in charge of the investigation directed that Woo be arrested on unrelated charges as soon as the test was concluded. At the suppression hearing, a testifying trooper conceded that Woo would not, therefore, have been permitted to leave the barracks.

At the conclusion of the polygraph, at approximately 6:30 p.m., the two troopers conducting the test told Woo that he had failed the test; that they "knew that he had murdered Sherri Aukerman"; and that "the only question remaining was the grade of the offense". They told Woo, "that this could be first degree murder" and "that it could, in fact, bear the death penalty." Warnings were not readministered prior to the post-test interrogation.

Woo responded by saying, "This talk is scaring me. Maybe I should talk to an attorney." The polygraph examiners told Woo he could do whatever he wanted, that as far as they were concerned, the case was a criminal homicide and that they were done with him.

Another trooper then walked into the polygraph room and arrested Woo on the unrelated charges. At approximately 7:25 p.m. Woo was handcuffed; chained to the wall in the hallway outside the polygraph room; and given

Miranda warnings. The arresting officer, rather than Woo, signed the waiver form. There was no further discussion at that point. No statements were taken. Woo was left sitting on a wooden bench in the hallway. As he left, the arresting officer told Woo that "if he felt like talking about the incident involving Sherri", he could.

Another of the troopers investigating the Aukerman homicide subsequently walked by, saw Woo sitting in the hallway with his head bowed and asked what was bothering him. The question was not preceded by *Miranda* warnings. Woo said he was "embarassed". The trooper advised him to do the right thing and walked away.

At some time after 9:00 p.m. Woo was taken to a kitchen area to share supper with two of the troopers. At approximately 10:00 p.m. one of the troopers asked, "Is something bothering you, you're sitting there picking at your food?" The question was not preceded by *Miranda* warnings. Woo replied that he was "embarassed". The trooper asked, "Embarassed about what." The second trooper said, "Let's finish eating our sandwiches and we'll talk about it".

Five to ten minutes later, the first trooper again asked, "What are you embarassed about?" Again, the question was not preceded by *Miranda* warnings. Woo said, "what do you want to know." The trooper replied that they were not going to "spoon feed" Woo, that he had to answer for himself. Woo then said, "I pulled the trigger." Woo was asked whether he "came right up behind her", to which he responded, "kind of off to the side". Woo went on to explain that he had become distraught over the way Aukerman treated him when she was drinking.

Immediately after this exchange, at approximately 10:30 p.m., the troopers administered *Miranda* warnings and proceeded to take both written and tape recorded inculpatory statements from Woo. Just after midnight Woo was formally placed under arrest on homicide charges.

Prior to trial Woo's counsel filed a motion to suppress the above-described statements as violative of the right against self-incrimination. 26a. The motion was denied. The trial court relied on this Court's opinion in *Davis v United States*, 512 U.S. 452 (1994) in denying the motion to suppress, holding that Woo's reference to an attorney did not comprise a clear invocation of the Fifth Amendment right to counsel. 21a-22a.

The trial court further held that even if Woo had clearly invoked the right to counsel after the polygraph, no violation under the Fifth and Fourteenth Amendments occurred, because the troopers stopped questioning him at that point. Thereafter, according to the trial court, the "offer of information" that ultimately produced the inculpatory statements was "initiated by the defendant". 22a. Suppression was therefore denied.

The contested statements were introduced into evidence against Woo at trial. He was convicted of first-degree murder. On March 27, 1996 he was sentenced to life imprisonment. 24a.

On April 22, 1997 the Superior Court of Pennsylvania entered judgment affirming the conviction. 12a. Citing this Court's Fifth Amendment precedents (7a), the Superior Court held that even if Woo's reference to an attorney were to be construed as constituting a request for counsel, "it was Appellant who reinitiated further conversation with the police concerning the events surrounding the victim's death, when he asked the officers what they wanted to know." 10a. The court concluded that Woo's "spontaneous utterance concerning his involvement in the shooting was unsolicited by the police and thus was admissible." 11a. Judgment was affirmed.

Woo timely filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court, which denied review by Order entered December 31, 1997. 25a.

REASONS FOR GRANTING THE WRIT

I. *DAVIS V. UNITED STATES*, 512 U.S. 452 (1994), AND ITS ABROGATION OF ANY REQUIREMENT THAT CLARIFYING QUESTIONS BE ASKED FOLLOWING AN AMBIGUOUS REQUEST FOR COUNSEL, SHOULD BE REEXAMINED.

The first question presented for review centers on Woo's statement, after being apprised that he might be facing the death penalty, that "This is scarying me. Maybe I should talk to an attorney".

Principally at issue is the Fifth Amendment right to counsel first defined in *Miranda v. Arizona*, 384 U.S. 436 (1966) and made applicable to the states through the Fourteenth Amendment. Under *Miranda* if a suspect requests counsel, "the interrogation must cease until an attorney is present." *Id.* at 474.

Miranda was reaffirmed in *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981), holding that an accused:

> . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

The *Edwards* rule was designed to prohibit authorities, "through '[badgering]' or 'overreaching'—explicit or subtle, deliberate or unintentional", from "wearing down" an accused. *Smith v. Illinois*, 469 U.S. 91, 98 (1984). *See, also, Michigan v. Mosley*, 423 U.S. 96, 105-106 (1975) (*Edwards* prevents police from "persisting in repeated efforts to wear down [the accused's] resistance and make him change his mind").

Here, interrogation did cease after Woo's remarks regarding an attorney, but it resumed nearly four hours

later. When it resumed no attorney was present, and inculpatory statements were elicited.

If Woo's reference to an attorney at approximately 6:30 p.m. comprised an invocation of the right to counsel, then any inculpatory statements made thereafter in response to interrogation or its "functional equivalent" must be suppressed. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

If Woo's remark did not comprise an invocation of the right to counsel, the question that remains is whether fresh warnings were required prior to the kitchen conversation that ultimately elicited the inculpatory statement.

In *Davis v. United States*, 512 U.S. 452 (1994) this Court held that nearly identical language, *i.e.*, "Maybe I should talk to an attorney", did not comprise an invocation of the Fifth Amendment right to counsel and did not oblige interrogating officers either to stop questioning the suspect or to clarify his intent before proceeding with the interrogation. Petitioner is before the Court respectfully urging a reexamination of *Davis*.

At the time *Davis* was decided there were three different models being used by lower federal and state courts to resolve issues related to ambiguous requests for counsel. The first was a *per se* approach, holding that ambiguous or equivocal references to counsel comprise an invocation of the right to counsel under *Miranda v. Arizona*, *supra*, 384 U.S. at 444-445 (Fifth Amendment right to counsel may be invoked "in any manner"). Where the right to counsel has been invoked, no further questioning is permitted.[1]

The second was the clarification approach. Under this model, although police are required to stop substantive

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[1] See, e.g., *Maglio v. Jago*, 580 F.2d 202 (6th Cir. 1978); *People v. Superior Court*, 542 P.2d 1390 (Cal. 1975), *cert. denied*, 429 U.S. 816 (1976); *People v. Plyler*, 272 N.W.2d 623 (Mich. Ct. App. 1978); *Ochoa v. State*, 573 S.W.2d 796 (Tex. Crim. App. 1978).

interrogation when a suspect makes an ambiguous reference to counsel, they are permitted to ask further questions to clarify the suspect's willingness to proceed in the absence of counsel. The great weight of federal and state authority prior to *Davis* endorsed the clarification model.[2]

The third approach permitted interrogating officers to ignore an ambiguous request for counsel and proceed with the interrogation. At the time *Davis* was decided, the only jurisdictions using this approach were Illinois,[3] Iowa,[4] Missouri,[5] and Oklahoma.[6]

In *Davis* a five-member majority of the Court adopted this third approach. A four-member minority, concurring in the judgment, would require investigators to clarify an ambiguous reference to counsel before proceeding with the interrogation, finding this approch to be the only one providing "coherence with nearly three decades of case

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[2] *See, e.g., United States v. Porter*, 776 F.2d 370 (1st Cir. 1985) (*en banc*); *United States v. Gotay*, 844 F.2d 971 (2d Cir. 1988); *United States v. Riggs*, 537 F.2d 1219 (4th Cir. 1976); *Nash v. Estelle*, 597 F.2d 513 (5th Cir. 1978) (*en banc*), *cert. denied*, 444 U.S. 981 (1979); *Howard v. Pung*, 862 F.2d 1348 (8th Cir. 1988); *United States v. Fouche*, 833 F.2d 1284 (9th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988); *United States v. March*, 999 F.2d 456 (10th Cir. 1992), *cert. denied*, 510 U.S. 983 (1993); *United States v. Mendoza-Cecelia*, 963 F.2d 1467 (11th Cir. 1991), *cert. denied*, 506 U.S. 964 (1992). *Also, see, Crawford v. State*, 580 A.2d 571 (Del. 1990); *Martinez v. State*, 564 So.2d 1071 (Fla. 1990); *People v. Benjamin*, 732 P.2d 1167 (Col. 1987); *State v. Robinson*, 427 N.W.2d 217 (Minn. 1988); *State v. Robtoy*, 653 P.2d 284 (Wash. 1982).

[3] *People v. Krueger*, 412 N.E.2d 537 (Ill. 1980), *cert. denied*, 451 U.S. 1019 (1981).

[4] *State v. Johnson*, 318 N.W.2d 417 (Iowa 1981), *cert. denied*, 459 U.S. 848 (1982).

[5] *State v. Phillips*, 563 S.W.2d 47 (Mo. 1978), *cert. denied*, 443 U.S. 904 (1979).

[6] *Lee v. State*, 560 P.2d 226 (Okla. Ct. App. 1977).

law addressing the relationship between police and criminal suspects in custodial interrogation". *Id.*, 512 U.S. at 467-68.

As the concurrence in *Davis* points out, there is no down side to the clarification approach. It protects the core values of the Fifth Amendment, while in no way inhibiting the police from pursuing non-coercive inquiries. This latter point is confirmed by the Brief for Americans for Effective Law Enforcement, Inc., International Association of Chiefs of Police, Inc., National District Attorneys association, and National Sheriffs' Association as Amici Curiae filed in *Davis*, characterizing the clarification approach as "a common sense resolution of the problem . . . [which] . . . fully accommodates the rights of the subject, while at the same time preserving the interests of law enforcement and of the public welfare". *Davis v. United States, supra,* 512 U.S. at 467, n.2.

It is respectfully submitted that the facts of this case demonstrate the wisdom of the concurring opinion and the need for a reexamination of the majority's holding in *Davis*.

The purpose of *Miranda v. Arizona, supra,* and *Edwards v. Arizona, supra,* is to prevent a suspect's will from being overborne by the coercive nature of custodial interrogation, thereby ensuring the voluntariness of any statements given to the authorities. That the will of this suspect was overborne by his interrogators was evident from the outset of their encounter. When asked to submit to a polygraph Woo replied, "If I have to, I will." The state troopers who took him from his home to the barracks never told Woo that he did not, in fact, have to take the test. Instead, they told him the test could not be used against him.

At 6:30 p.m., five hours after his arrival at the barracks and the administration of *Miranda* warnings—five hours spent in the constant company and scrutiny of state

troopers—Woo was told that he had failed the polygraph and could be facing the death penalty. His response: "This is scaring me. Maybe I should talk to an attorney."

The record here demonstrates the importance of factual context in evaluating a suspect's reference to an attorney. On this record, Woo's remark was a plain indication that he did not feel competent to deal with the situation himself. *Davis*, however, forecloses any consideration of context.

Following Woo's comment, formal interrogation stopped; but the "wearing down", *Smith v. Illinois*, *supra*, 469 U.S. at 98, continued in other, more subtle forms. After his arrest on other charges, the state trooper who left him chained to the wall invited Woo to talk about Sherri Aukerman. Woo said nothing. Another trooper walked by, asked Woo what was bothering him, and advised him to "do the right thing." Woo said nothing. Several hours later he is moved to the kitchen and seated with two troopers for supper. "What's bothering you?" "What are you embarassed about?" Woo said nothing. Again, "What are you embarassed about?" Finally, Woo said, "I pulled the trigger."

It must be assumed that Woo believed that he *had* indicated his unwillingness to proceed without counsel at 6:30 p.m. For four hours thereafter he nonetheless endured comments and subtle pressure to talk from nearly every investigator who walked by him. He finally caved in. On this record, to call Woo's inculpatory statement a "spontaneous utterance" (11a), an "offer of information . . . initiated by the defendant" (22a) is ludricrous.

If Woo had simply been asked at 6:30 p.m., or any time thereafter, whether he was willing to continue talking to investigators without an attorney present, none of this controversy would have arisen. The clarifying question is a simple expedient that not only protests the core values of the Fifth Amendment, but also, in the great majority

of cases, will cause the light to change from yellow to green for interrogating officers. The clarifying question not only removes all doubt regarding the suspect's desires and intent; it also confirms the propriety of everything that follows it.

It is respectfully submitted that the Court's elimination of the clarifying question following an ambiguous request for counsel should be reexamined.

II. GRANTING CERTIORARI ON THE REMAINING QUESTIONS, *i.e.*, WHAT COMPRISES THE "FUNCTIONAL EQUIVALENT" OF INTERROGATION AND WHAT CHANGE IN CIRCUMSTANCES REQUIRES FRESH *MIRANDA* WARNINGS, WOULD ENABLE THE COURT TO PROVIDE UNIFIED AND DEFINITIVE RULES FOR THE CONDUCT OF CUSTODIAL INTERROGATIONS.

The second question presented is whether Woo was interrogated under *Miranda* by the troopers' repeated inquiry: "What is bothering you?". Both lower courts found that Woo's inculpatory statements in the kitchen of the state police barracks were "spontaneous utterances" that were unsolicited by the police. Both analyses essentially ignored the troopers' questions to Woo about what was bothering him. If those questions comprised interrogation, Woo's statements cannot be characterized as either spontaneous or unsolicited.

Rhode Island v. Innis, 446 U.S. 291, 301 (1980) held that "interrogation" for Fifth Amendment purposes includes not only express questioning, but also its "functional equivalent". In *Innis* two police officers, in the presence of a robbery suspect who had invoked the right to counsel, discussed their concern for the safety of children in the area if the shotgun used in the robbery was not found. The defendant interrupted the conversation and offered to show the officers where the gun was located. On these facts the Court held that the defendant had not been interrogated within the meaning of *Miranda*, finding

nothing in the record to suggest that the officers' conversation was "designed to elicit a response" from the defendant. *Id.* at 302, n. 6.

The Court has since declined most opportunities to clarify what was meant in *Innis* by the "functional equivalent" of interrogation. In both *Innis* and one other case decided on the merits, *Arizona v. Mauro,* 481 U.S. 520 (1987) (permitting a wife to speak with her husband in the presence of police officers is not interrogation, notwithstanding the fact that the police believed it "possible" the husband would make incriminating statements during the meeting), the Court discussed what is *not* interrogation. There is, however, no guidance from the Court on what *does* comprise the functional equivalent of interrogation.

Cases in which the Court has declined the opportunity to provide such guidance include *Lewis v. Florida,* 486 U.S. 1036 (1988) (White, J. dissenting) (whether showing a defendant inculpatory evidence comprises interrogation); *Henderson v. Florida,* 473 U.S. 916 (1985) (Marshall, J. dissenting) (whether "casual conversation" with a prisoner during transport, leading him to ask "what we would do then", is the functional equivalent of interrogation); *James v. Arizona,* 469 U.S. 990 (1984) (Brennan, J. dissenting) (whether defendant was interrogated under *Miranda* when one officer asked another, in the presence of the defendant, "is he going to show us where the body is").

Cf., United States v. Henry, 447 U.S. 264 (1980) (under the Sixth Amendment right to counsel, cellblock informant who engaged the defendant in general conversation, thereby providing the opportunity for discussion of the crime charged, held to have deliberately elicited inculpatory statements). *Also, cf., Oregon v. Bradshaw,* 462 U.S. 1039 (1983) (defendant who asked, "Well, what is going to happen to me now?" found to have initiated communication and to have waived previously

invoked rights, where there was no claim that defendant's question was prompted by any remarks made by the police).

The questions here were, "What's bothering you?" and "What are you embarassed about?" Defining whether such questions comprise the functional equivalent of interrogation would provide needed clarification of *Rhode Island v. Innis, supra.*

The final question presented for review is whether a change in the circumstances of custodial interrogation, together with a lapse in time of several hours from the initial administration of *Miranda* warnings, requires that fresh warnings be given. This is also a question on which there is scant guidance from the Court.[7]

In *Wyrick v. Fields,* 459 U.S. 42 (1982) the defendant agreed to submit to a polygraph test; was given *Miranda* warnings prior to the test; completed the test; was advised by the examiners that the test showed some deceit; and was then asked if he could explain the discrepancies. In moving to suppress the statements made immediately after the test, the defendant contended that his prior *Miranda* waiver applied only to administration of the test itself and that new warnings were therefore required after the polygraph had been concluded. The Court disagreed, holding that the defendant's prior waivers remained valid, "unless the circumstances changed so seriously that his answers no longer were voluntary, or unless he no longer was making a 'knowing and intelligent relinquishment or abandonment' or his rights." *Id.* at 47.

Here, inculpatory statements were elicited at approximately 10:30 p.m., eight hours after warnings were given with respect to the homicide and three hours after they were administered in connection with Woo's arrest on other charges. In the intervening hours Woo was moved

[7] The issue was not addressed below by either the trial court or the Supreme Court of Pennsylvania.

from a hallway to a downstairs office, and then into the kitchen, where he shared supper with two troopers. Unlike the earlier interrogations, the kitchen conversation was deceptively casual. It was, nonetheless, quite plainly intended to elicit a response from Woo. And it did.

It is respectfully submitted that the question whether this change in circumstances, taken together with the lapse in time, required that new warnings be given merits review by this Court.

CONCLUSION

Granting review on the questions presented here would enable the court to provide unified and definitive rules for the conduct of custodial interrogations. For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. STEWART *
1710 Lawyers Building
428 Forbes Avenue
Pittsburgh, PA 15219
(412) 471-1957
Counsel for Petitioner
Roger J. Woo

* Counsel of Record

APPENDICES

APPENDIX A

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 00601 PGH 1996

COMMONWEALTH OF PENNYSLVANIA

v.

ROGER J. WOO,

Appellant

Appeal from the Judgment of Sentence March 27, 1996 in the Court of Common Pleas of Westmoreland County, Criminal, No. 3290 of 1994

BEFORE: TAMILIA, SAYLOR, AND SCHILLER, JJ.

MEMORANDUM: FILED: APRIL 22, 1997

This is an appeal from a sentence of life imprisonment for first degree murder entered in the Court of Common Pleas of Westmoreland County. We affirm.

On September 18, 1994, at approximately 6:30 p.m., Edward L. Lechner, III was driving his truck down a trail toward Ruote 981 in Derry Township, Westmoreland County, when he heard several gunshots. He continued driving, until he noticed a red car parked to the right of the trail. No one was in or near the car, which had both its driver's side and passenger's side doors open. Suddenly, Appellant, Roger Woo, appeared beside the car, waving his arms and calling, "Help, help, my friend is shot, she's shot." Mr. Lechner got out of his truck and followed

Appellant to an area near the car, where he observed a gun lying on the ground about four or five feet from the head of the victim, Sherri Lynn Aukerman. Mr. Lechner ran over to the victim and asked Appellant what had happened. Appellant responded that the victim had been "playing around" with the gun and had pointed it at him, and then at her head. He stated that he had told her not to do that, and had then grabbed her arm in order to stop her, at which time the gun discharged. Mr. Lechner asked Appellant where the victim had been shot, and Appellant, after first replying that he did not know, stated that he thought she had been shot in the head.

Mr. Lechner observed the victim displaying signs of life, and told Appellant that he was going to get help. As Mr. Lechner got into his truck, Appellant ran up to him and offered to go with him. Mr. Lechner told Appellant that he should stay with the victim, and that if he wanted to be helpful, he could park his car by the highway so that the ambulance would know where they were situated. Appellant did so, while Mr. Lechner drove to a nearby home to call for an ambulance.

When Mr. Lechner returned to the scene, Appellant was standing by the victim. Mr. Lechner asked Appellant if he knew whether the victim was breathing, and Appellant replied that he did not know. Mr. Lechner responded, "Don't just stand there, do something." Appellant told Mr. Lechner that he did not know what to do; accordingly, Mr. Lechner instructed him in administering cardiopulmonary resuscitation to the victim. Concerned because the ambulance had not yet arrived, Mr. Lechner then drove to another nearby home and telephoned "911." The state police and an ambulance thereafter arrived at the scene. The victim was pronounced dead later that evening; the cause of death was determined to be a gunshot wound to the head.

On September 23, 1994, two police officers went to Appellant's residence to pick up a handgun, at Appellant's

request. Upon arriving at Appellant's home, the officers gave him *Miranda* warnings, had Appellant sign a waiver form, and proceeded to ask him some questions. Appellant informed the officers that he had been seeing the victim for approximately three months and that they had been planning to get married. Eventually, the officers asked Appellant if he would agree to submit to a polygraph examination. Appellant followed the officers in his own vehicle to the police barracks, where he was advised that he was free to leave at any time and that he did not have to complete the polygraph preparation form. Appellant thereafter completed the form and wrote a detailed description of the events of September 19, 1994, claiming that the victim's death had been accidental.

Prior to the polygraph examination, Appellant was given *Miranda* warnings and signed a waiver form. However, at no time prior to or during the examination was Appellant placed under arrest; rather, he was free to interrupt the examination at any time and was permitted to leave the room several times to make telephone calls. During either the pre-test or post-test interview, Appellant was questioned regarding the events on the date of the victim's death, and he responded, "Oh, you mean the day I killed her?" When asked if he realized what he had just said, Appellant became very flustered and attempted to explain, ". . . I guess I meant I killed her by accident, by knocking her hand away."

At the conclusion of the examination, the examining officer determined that Appellant had failed the polygraph test. When the officer informed Appellant that he belived that Appellant was responsible for the victim's death and began explaining the different degrees of homicide to him, Appellant stated, "This talk is scaring me. Maybe I should talk to an attorney." The officer replied that Appellant could do whatever he wished, did not question him further, and left the barracks. None of the other officers who were present engaged in further interrogation of Appellant.

Immediately thereafter, Appellant was arrested for solicitation to commit homicide in connection with earlier attempts that he had made to have his wife killed. Appellant was given *Miranda* warnings, and after being patted down and handcuffed, he was taken to the kitchen area of the barracks and given a sandwich to eat while the officers ate their own snacks. Appellant appeared to be perturbed, as he was picking at his food. One of the officers asked him if something was wrong, to which Appellant replied that he was embarrassed about something. Another officer then suggested that they all finish their sandwiches, and then they could talk about whatever was embarrassing Appellant.

After Appellant and the officers had finished eating, the conversation turned to the subject of Appellant's embarrassment. Appellant asked the officers what they wanted to know, and one of the officers replied that they could not tell him what to say, or "spoon feed" him, but that if he had something to say, they would listen. At that point, Appellant turned to the officer and stated, "I pulled the trigger." Appellant then related, in a distraught manner, the details of his relationship with the victim, as well as how he had shot her. The officers thereafter took both written and tape-recorded statements from Appellant, in which he admitted that he had intentionally shot the victim. During the course of both statements, Appellant was again advised of his rights and given *Miranda* warnings. At all times, Appellant indicated that he understood his rights and that he wished to make the statement, specifically indicating in his tape-recorded statement that no one had threatened him and that he was being treated respectfully.

At the conclusion of his statements, Appellant was arrested and charged with criminal homicide for the death of Sherri Lynn Aukerman. Prior to trial, Appellant filed an omnibus pretrial motion, in which he petitioned for a writ of habeas corpus, challenging the sufficiency of the

Commonwealth's evidence at the preliminary hearing. Specifically, Appellant contended that the Commonwealth had been permitted to introduce statements that he had made concerning the crime, when the corpus delicti of the crime had not yet been established by independent evidence. Appellant also moved to suppress his confession to the officers, contending that such statement had been obtained improperly.

The trial court, in ruling upon Appellant's habeas corpus petition, found that the facts of the case, viewed as a whole, indicated that the death of the victim had occurred under circumstances which indicated the likelihood of criminal activity. Accordingly, the court held that Appellant's statements and subsequent confession were properly admitted at the preliminary hearing, and Appellant's petition was denied. With respect to Appellant's motion to suppress his confession to the officers, the court held that in the absence of a definite and clear request by Appellant to exercise his right to counsel, the police officers did not act improperly toward Appellant after he made his ambiguous statement that "maybe" he "should talk to an attorney." Additionally, the court noted that the officers ceased questioning Appellant after his remark, and that Appellant had made his inculpatory statement after he had re-established communication with the officers upon his own initiative. Therefore, the court denied Appellant's suppression motion.

At Appellant's jury trial, the Commonwealth presented the testimony of one of the officers who was at the scene of the crime, concerning the position of the gun and the shell casings with respect to the victim's body. Evidence was also presented concerning the fact that Appellant had taken a CPR course and had also completed a basic first aid course. Additionally, several witnesses testified concerning Appellant's behavior immediately following the shooting; specifically, testimony was offered regarding Appellant's inconsistent explanations as to how the victim

had been shot, as well as Appellant's comments and reaction to news coverage of the incident several days later.[1]

At the close of all of the evidence, defense counsel moved for a judgment of acquittal, contending that the Commonwealth could not use Appellant's inculpatory

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[1] Appellant contends that the testimony of the following witnesses constituted evidence of inculpatory statements which he made after the shooting:

Mr. Lechner testified that he heard Appellant say, "Help, help, my friend is shot, she's shot . . ." as Appellant was coming towards him at the scene of the crime. Mr. Lechner further testified that when he asked Appellant what had happened, Appellant told him that the victim had been "playing around," pointing the gun at him and at herself, and that when he ran over to her in an attempt to pull the gun away from her, it went off accidentally. Mr. Lechner also stated that when he asked Appellant where the victim was wounded, Appellant informed him that she had been shot in the head.

Jeff Kuhn, a paramedic, testified that when he arrived at the scene of the shooting and asked Appellant what had happened, Appellant told him that the victim had been pointing the gun at him and that he had accidentally hit her arm, causing the gun to discharge.

Terri Rae Bednar, an acquaintance of the victim, testified that approximately two days after the shooting, she heard Appellant make the statement, "Now I know what she was like, I don't feel so bad, the bitch got what she deserved."

Trooper Leo Jackson, Jr. testified that when he arrived at the scene of the crime, Appellant told him that the victim had been pointing the gun at her head and "kidding around," saying that she was going to shoot herself. Trooper Jackson stated that Appellant told him the gun had accidentally fired when he tried to grab it away from the victim, and that Appellant asked him several times if the victim was dead and then inquired of her medical condition.

Walter Wanesky, one of Appellant's co-workers, testified that several days after the shooting, he asked Appellant if he had seen a newspaper article that day concerning the shooting. Wanesky said that Appellant began laughing about the article and then indicated that the newspaper had "got it all wrong."

statements to establish the corpus delicti of the crime, namely, that the victim's death had not been accidental, but instead was the result of criminal activity. The trial court denied the motion. Following the prosecutor's closing argument, defense counsel again objected to the use of Appellant's statements to establish the corpus delicti. A side bar conference was held, at which time the trial court informed counsel that it would instruct the jury that it was not permitted to consider any of Appellant's inculpatory statements in determining whether the corpus delicti of the crime had been established beyond a reasonable doubt.

After the jury had been instructed accordingly and had deliberated, Appellant was found guilty of first degree murder and was subsequently sentenced to life imprisonment. This appeal followed, in which Appellant raises the following issues:

> 1) Did the police obtain Appellant's confession in violation of his right to counsel as guaranteed by Article I, Section 9 of the Pennsylvania Constitution?
>
> 2) Did the trial court err in admitting extra judicial statements of the accused to prove the corpus delicti?

In his first issue, Appellant challenges the suppression court's ruling concerning the admissibility of his inculpatory statement, "I pulled the trigger," and his confession which he made to the officers following his arrest on unrelated charges. Specifically, Appellant contends that the remarks he made concerning the possibility of speaking with an attorney immediately following his polygraph examination constituted an invocation of his fifth amendment right to have counsel present during interrogation by law enforcement officials.[2] Accordingly, Appellant

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[2] "The Fifth Amendment right identified in *Miranda* [*v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)] is the right to have counsel present at any custodial interrogation." *Edwards*

claims that because such alleged request was not honored, any subsequent inculpatory statements which he made to the officers were rendered involuntary and should have been suppressed.

In reviewing a trial court's suppression ruling, this court must determine

> whether the factual findings are supported by the record. In making this determination, we must consider only the evidence of the prosecution's witnesses, and so much evidence of the defense that remains uncontradicted when fairly read in the context of the record as a whole. When the evidence supports the factual findings, we are bound by such findings; we may reverse only if the legal conclusions drawn therefrom are erroneous.

Commonwealth v. Williams, 539 Pa. 61, 71-72, 650 A.2d 420, 425-426 (1994).

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v. Arizona, 451 U.S. 477, 485-486, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981), *reh'g. denied*, 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981). In *Edwards*, the United States Supreme Court reconfirmed the holding of *Miranda* and its progeny, that once an accused has exercised his right to have counsel present during a custodial interrogation, all questioning of the accused must cease, and law enforcement authorities cannot reinitiate interrogation until counsel has been secured and is present. The Pennsylvania Supreme Court has likewise held that where a suspect invokes his fifth amendment right to counsel, state officials are subsequently prohibited from interrogating the suspect without the presence of counsel. *See, Commonwealth v. Santiago*, 528 Pa. 516, 599 A.2d 200 (1991), *appeal after remand*, 541 Pa. 188, 662 A.2d 610 (1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 722, —— L.Ed.2d —— (1996). However, the Supreme Courts of the United States and this Commonwealth have both acknowledged that such right may be waived after having been invoked by the accused, where the accused himself initiates further communications, conversations or exchanges with the police. *See, Edwards v. Arizona, supra; Commonwealth v. Zook*, 520 Pa. 210, 553 A.2d 920, *cert. denied*, 493 U.S. 873, 110 S.Ct. 203, 107 L.Ed.2d 156 (1989), *appeal after remand*, 532 Pa. 79, 615 A.2d 1 (1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 1420, 122 L.Ed.2d 789 (1993).

Here, Appellant argues that the Superior Court's holding in *Commonwealth v. Waggoner,* 373 Pa.Super. 23, 540 A.2d 280 *allocatur denied,* 520 Pa. 616, 554 A.2d 509 (1988), *cert. denied,* 490 U.S. 1031, 109 S.Ct. 1769, 104 L.Ed.2d 204 (1989), is controlling in this case. In *Waggoner,* the court held that where a defendant's assertion of his fifth amendment rights, particularly the right to counsel, is ambiguous and inconsistent with an officer's explanation of such rights, the officer should ask questions to clarify what the defendant meant by his statement or why he made it.[3] The rationale underlying the court's holding was that where a defendant's statement concerning his right to counsel is ambiguous, it cannot be deter-

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[3] Appellant further urges this court to reject the United States Supreme Court's approach to the identical issue in *Davis v. United States,* —— U.S. ——, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), wherein the Court held that if an accused's reference to his right to counsel is ambiguous or equivocal, an officer is not required to cease questioning the accused; rather police questioning must cease only upon an accused's unequivocal, actual request for an attorney.

The trial court, in denying Appellant's motion to suppress, relied upon *Davis* as controlling, and thus concluded that in the absence of a clear and definite request by Appellant to exercise his right to counsel, the officers did not act improperly toward Appellant after his ambiguous comment, which they were under no obligation to clarify, and that such comment did not constitute a formal request for counsel.

However, it is well settled that in interpreting a provision of the Pennsylvania Constitution and the protections afforded thereby, Pennsylvania courts are not bound by the decisions of the United States Supreme Court which interpret similar, yet distinct, federal constitutional provisions. *Commonwealth v. Edmunds,* 526 Pa. 374, 586 A.2d 887 (1991). "[T]he federal constitution establishes certain minimum levels which are 'equally applicable to the [analogous] state constitutional provision.' . . . However, each state has the power to provide broader standards, and go beyond the minimum floor which is established by the federal Constitution." *Id.,* 526 Pa. at 388, 586 A.2d 894 (citation omitted). Accordingly, the United States Supreme Court's holding in *Davis* does not necessarily control the disposition of this case, in which Appellant has alleged a violation of his state constitutional rights.

mined with a sufficient degree of certainty whether any subsequent waiver of such right by the defendant was made knowingly, intelligently and voluntarily.

Here, even if Appellant's statement, ". . . Maybe I should talk to an attorney," is construed as constituting a request for counsel, the record supports the finding of the suppression court that the actions of the police in response to such statement did not violate Appellant's constitutional rights. Immediately after Appellant's remark, the officers ceased questioning Appellant and told him he could do "whatever he wished;" however, Appellant made no further mention of exercising his right to counsel. The only conversation which took place between Appellant and the officers thereafter was casual in nature, and it was Appellant who reinitiated further conversation with the police concerning the events surrounding the victim's death, when he asked the officers what they wanted to know. *See, Edwards v. Arizona*, 457 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 46, 12 L.Ed.2d 49 (1990); *Smith v. Illinois*, 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984); *Commonwealth v. Zook, supra* (once suspect invokes right to counsel, all questioning must cease, unless the accused initiates further communication, exchanges or conversation with the police). After this remark by Appellant, the officers did not resume questioning him, but instead informed him that they could not tell him what to say. It was then that Appellant volunteered the information that he had pulled the trigger and had killed the victim. At that point, the officers gave him another *Miranda* warning, and Appellant waived his rights and proceeded to give detailed written and tape recorded statements of the events surrounding the victim's death. Accordingly, the record supports the suppression court's finding that none of the actions on the part of the police were calculated to evoke an admission from Appellant, *see, Commonwealth v. Brantner*, 486 Pa. 518, 406 A.2d

1011 (1979), and that Appellant's spontaneous utterance concerning his involvement in the shooting was unsolicited by the police and thus was admissible. *Commonwealth v. Clark*, 454 Pa. 329, 311 A.2d 910 (1973); *Commonwealth v. Whitley*, 500 Pa. 442, 457 A.2d 507 (1983). Therefore, Appellant's first issue is meritless.

* * * *

Judgment of sentence affirmed.

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

No. 601 Pittsburgh, 1996

COMMONWEALTH OF PENNSYLVANIA

v.

ROGER J. WOO,

Appellant

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of WESTMORELAND County be, and the same is hereby AFFIRMED.

BY THE COURT:

/s/ Eleanor R. Valecho
Deputy Prothonotary

Dated: April 22, 1997

APPENDIX B

IN THE COURT OF COMMON PLEAS
OF WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

No. 3290 C 1994

COMMONWEALTH OF PENNSYLVANIA

vs.

ROGER JIUMMING WOO,
Defendant.

OPINION AND ORDER

BY JUDGE RICHARD E. McCORMICK, JR.:

On September 24, 1994, the defendant was charged with violating section 2501(a) of the Pennsylvania Crimes Code, the crime of criminal homicide. Specifically, the criminal complaint alleges that the defendant intentionally, knowingly, recklessly or negligently caused the death of Sherri Lynn Auckerman on September 18, 1994, at a location at SR 981 near Dusty's Drive-In in Derry Township, Westmoreland County. On that date, Ms. Auckerman died as a result of complications arising from a gunshot wound to the head.

A preliminary hearing was held on this charge on October 26, 1994, before District Justice Mark J. Bilik, and at the close of the hearing, the charges were bound over to court.

The defendant, through his counsel, Thomas R. Ceraso, Esquire, filed Omnibus Pretrial Motions pursuant to Rules

305 and 306 of the Pennsylvania Rules of Criminal Procedure, which include motions for discovery, a petition for habeas corpus and a motion to suppress evidence. At the start of the hearings held by this Court on the matters raised in the pretrial motions, defense counsel agreed that the Commonwealth fulfilled its obligation to comply with the defense request for discovery. Accordingly, we proceed in this opinion to address the two remaining issues:

(1) whether the prosecution at the preliminary hearing held before the district justice failed to establish a corpus delecti of the crime by the independent proof prior to introducing an extra-judicial admission or confession of the defendant, contrary to the law established in *Commonwealth v. Meder*, 416 Pa.Super. 273, 611 A.2d 213 (1992), *alloc. denied in* 622 A.2d 1375 (1993), *Commonwealth v. Brusky*, 219 Pa.Super. 54, 280 A.2d 826 (1971), and *Commonwealth v. Turza*, 340 Pa. 128, 16 A.2d 401 (1940); and

(2) whether the law enforcement authorities elicited inculpatory oral and written statements from the defendant under circumstances which would have required them to give him the requisite warnings under the case law of *Miranda vs. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

* * * *

2. Motion to Suppress.

On September 23, 1994, Criminal Investigator Kenneth A. Karas (hereinafter referred to as "Karas") and Trooper Matthew C. Baumgard (hereinafter referred to as "Baumgard") went to the defendant's residence shortly after noon at the request of the defendant for the purpose of picking up a handgun (Suppression Hearing Testimony, page 158, hereinafter referred to as "SHT ——"). When the police arrived, they asked to speak to the defendant and filled out a Pennsylvania State Police Rights and Warning

Waiver form, which the defendant appeared to understand (SHT 159). Eventually, the defendant was asked whether he would agree to take a polygraph examination (SHT 160). He was taken to the police barracks where a scan form was prepared and completed at approximately 2:50 p.m. (SHT 163). The police advised him that he was free to go at any time and that he did not have to complete the scan form, yet he agreed to do so. At the end of the questionnaire a notation indicated that the defendant's physical and mental condition appeared "drained, tired, relieved that it is getting closer to being finished" (SHT 187). Furthermore, the defendant appeared "nervous" to the state police (SHT 188).

Prior to the administration of the polygraph test, Trooper Richard T. Ealing (hereinafter referred to as "Ealing") testified that he read the *Miranda* warnings to the defendant and that he signed a polygraph waiver (SHT 64, 126). At the time of the test, the defendant had not formally been placed under arrest and, in fact, was free to interrupt the examination and permitted to leave the room on several occasions to make personal and business telephone calls (SHT 69, 77).

Ealing and Trooper Robert G. Luniewski (hereinafter referred to as "Luniewski"), the polygraph examiner for Troop A, Greensburg, determined that the defendant was deceptive, had failed the polygraph and was responsible for the death of Sherri Auckerman. From that point on, the defendant hung his head, looked at the floor and did not deny having killed Ms. Auckerman on purpose (SHT 74). Ealing explained to the defendant that they knew that he intentionally killed Ms. Auckerman and that the only question remaining was the gravity of the offense. The defendant responded, "This is scaring me, maybe I should talk to an attorney." (SHT 74, 132)[2] Ealing

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[2] Although the defendant argues in his brief that it is significant that Trooper Luniewski was paraphrasing the defendant's refer-

replied that the defendant could do whatever he wanted to, and that his job and Trooper Luniewski's job was now completed as far as he was concerned. Trooper Zimmerman was notified that the polygraph examination was completed, and Ealing and Luniewski left.

Either during the pre-test or the post-test interview which accompanied the polygraph examination, when questioned with regard to the events which occurred on the day in question, the defendant stated, "Oh, you mean the day I killed her." (SHT 75, 131) After catching his admission, the defendant attempted to explain, "Well, I guess I meant I killed her by accident by knocking her hand away." (SHT 75)

After the defendant referred to an attorney, no further questions were asked by Ealing or Luniewski.

At approximately 7:25 p.m. Zimmerman placed the defendant under arrest for solicitation to commit homicide as a result of allegations of earlier attempts that the defendant made to arrange to have his wife killed. He read a waiver of rights form to the defendant, conducted a "patdown" search and handcuffed him to a bench (SHT 154-155). While several of the troopers ate a snack, the defendant was given a sandwich to eat. He appeared to be bothered and was "picking at his food" (SHT 312). Baumgard asked him if there was something wrong, to which the defendant replied that he was embarrassed about something. Zimmerman suggested that they finish their sandwiches and that they "talk about it" after their meal (SHT 313). The following testimony was given with regard to what happened next:

> "A I believe we got back on the topic about what's embarrassing Mr. Woo, and Mr. Woo more or less

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ence to an attorney (SHT 312), Trooper Ealing also testified that the defendant said "maybe I should talk to an attorney" (SHT 74). Note that the witnesses were sequestered during the hearing.

said, "Well, what do you want to know" and I believe Trooper Baumgard said words to the effect that, "You know, we can't tell you what to say, we can't spoon feed you", words to that effect.

Q What did Mr. Woo say?

A Eventually he just came out—He turned to me and he said, "I pulled the trigger." . . .

He went on after that. He was distraught. She didn't treat him well when she had been drinking. When she was not drinking, she treated him well. Words along those lines." (SHT 313-314)

Zimmerman then asked the defendant if he would give a written statement, but before doing so "read through his *Miranda* warnings again with him" (PHT 64, SHT 315-316). The trooper took both a written and a taped statement from the defendant wherein he specifically admits to having intentionally shot Ms. Auckerman (PHT 66-68). During the course of the taping of the statement, Trooper Karas again read the *Miranda* warnings to the defendant.

The Fifth Amendment of the United States Constitution provides that "no person . . . shall be compelled in any criminal case to be a witness against himself . . .". Further, Article 1, section 9 of the Constitution of the Commonwealth of Pennsylvania provides, "in all criminal prosecutions, the accused hath a right to be heard by himself and his counsel, . . . he cannot be compelled to give evidence against himself . . .". In analyzing the applicability of these constitutional provisions to the case at hand, first, we will examine whether the defendant was subject to a custodial interrogation and second, we will determine whether the defendant was given adequate *Miranda* warnings and, therefore made a knowing and intelligent waiver of the privileges against self-incrimination and right to legal counsel.

The defendant's brief directs us to the test for custodial interrogation in the case of *Commonwealth v. Brown*, 473 Pa. 562, 375 A.2d 1260 (1977), which is as follows:

> As this Court stated in *Commonwealth v. O'Shea*, 456 Pa. 288, 292, 318 A.2d 713, 715, *cert. denied*, 419 U.S. 1092, 95 S.Ct. 686, 42 L.Ed.2d 685 (1974) the test for custodial interrogation is
>
> > 'whether the suspect is physically deprived of his freedom in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by some interrogation. . .' . [Citations omitted.]
>
> . . . Thus, custodial interrogation does not require that the police make a formal arrest, nor that the police intend to make an arrest. Id.; *Commonwealth v. O'Shea*, supra; *Commonwealth v. Bordner*, 432 Pa. 405, 247 A.2d 612 (1968). Rather, the test of custodial interrogation is whether the individual being interrogated reasonably believes his freedom of action is being restricted.

The analysis continues in *Commonwealth v. Williams*, Pa., 650 A.2d 420 (1994), wherein the court states:

> Before an individual is subject to a custodial interrogation, he must make a knowing and intelligent waiver of his privilege against self-incrimination and right to counsel after adequate warning as to those rights. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Whether a person is in custody for *Miranda* purposes depends on whether the person is physically denied of his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by the interrogation. *Commonwealth v. O'Shea*, 456 Pa.

> 288, 318 A.2d 713 (1974), *cert. denied*, 419 U.S. 1092, 95 S.Ct. 686, 42 L.Ed.2d 685 (1974). Moreover, the test for custodial interrogation does not depend upon the subjective intent of the law enforcement officer interrogator. Rather, the test focuses on whether the individual being interrogated reasonably believes his freedom of action is being restricted. *Commonwealth v. Brown*, 473 Pa. 562, 375 A.2d 1260 (1977).

The court in *Stansbury v. California*, 511 U.S. ——, 128 L.Ed.2d 293, 114 S.Ct. 1526 (1994), further refines the inquiry when it states:

> . . . [A]n officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave.

With this legal background we evaluate the case at hand.

The defendant was advised of his *Miranda* rights on several occasions: when the police arrived after he summoned them to his house; at the police barracks prior to his agreeing to take the polygraph examination; at the police barracks after taking the polygraph examination; immediately prior to being arrested on the solicitation to commit murder charge; and immediately prior to his writing a statement of confession and giving an oral, taped statement of confession.

The defendant first made statements directly implicating himself more than six (6) hours after the first *Miranda* warning was given. The defendant argues that if the defendant was under arrest at this first instance when he was given *Miranda* warnings, that his inculpatory

statements must be suppressed under the case law of *Commonwealth v. Gray*, 415 Pa.Super. 77, 608 A.2d 534, 551 (1992). The *Gray* court, relying on *Commonwealth v. Davenport*, 471 Pa. 278, 370 A.2d 301 (1977) and *Commonwealth v. Duncan*, 514 Pa. 395, 525 A.2d 1177 (1987), held that if a statement is taken from the accused within a six (6) hour period after arrest, it is admissible as long as it was not obtained by coercion or other illegality. Only statements made after the six (6) hour period should be suppressed.

We do not find that the defendant was under arrest at the time the *Miranda* warnings were given at the defendant's home for the following reasons. First, the defendant himself summoned the police to his house in order to turn in a weapon. Second, the officers gave the defendant the option to accompany them to the police station to take a polygraph examination; he was not forced or coerced into doing so. Third, during the time that the officers were conducting pre-test procedures in preparation for conducting the polygraph exam itself, the defendant was given complete freedom to conduct personal and professional business on the telephone, and in fact, the defendant availed himself of this opportunity on several occasions. Under these circumsatnces we do not find that the defendant would have reasonably believed that his freedom of action was restricted prior to the completion of the polygraph examination.

The defendant asks us to consider the timing of the *Moranda* warnings and whether rewarnings were required at the time the initial inculpatory statements were made by the defendant. He refers us to the case of *Commonwealth v. Dixon*, 475 Pa. 365, 380 A.2d 765 (1977), in support of his position that rewarnings were not timely given in this case. The *Dixon* defendant was given *Miranda* warnings when he was arrested. Three hours after his arrest he made an inculpatory statement; five and one-half hours after his arrest he made a second in-

culpatory statement; and eight and one-half hours after the initial warning and arrest, he made a third inculpatory statement. The court held that the inculpatory statements must be suppressed because of the failure of the officers to rewarn the defendant during this period of time. We find that the fact scenario in *Dixon* is distinguishable from that in the present case in that the defendant herein was apprised, not once, but at each step of the way, of his right to counsel and rights against self-incrimination.

Finally, the defendant asserts that his declaration, "This is scaring me, maybe I should talk to an attorney," was an ambiguous statement and an invocation of his right to counsel as that rule is stated in *Commonwealth v. Waggoner*, 373 Pa.Super. 23, 540 A.2d 280 (1988), *alloc. denied* in 554 A.2d 509 (1989). We find that the recent decision of the United States Supreme Court in *Davis v. United States*, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) governs our ruling in the instant case. In *Davis* the Supreme Court did not require the cessation of questioning "until and unless the suspect clearly requests an attorney." If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him. The *Davis* defendant's remark "maybe I should talk to a lawyer" was not deemed to be a formal request for counsel and the officers properly determined that he was not invoking his right to counsel. Furthermore, the Court determined that it would decline to adopt a rule which would require interviewing officers to ask additional clarifying questions of a suspect after he made such an ambiguous remark. The Court ruled that the *Davis* officers properly continued to question the suspect after this remark was made, and the incriminating statements which the defendant made subsequently were admissible.

The defendant herein stated, "maybe I should talk to an attorney", using substantially the same words as the *Davis* defendant. The defendant did not make a specific

request but rather pondered aloud the possibility of consulting with legal counsel. In the absence of a definite and clear request to exercise his given right to counsel, the police officers did not act improperly toward the defendant after this ambiguous statement was made. The United States Supreme Court's ruling in *Davis* directly governs the obligation of the police officers in the instant case, and therefore, their actions with respect to the defendant were appropriate.

We recognize that Trooper Ealing (SHT 115) and Trooper Luniewski (SHT 132-3) testified that they ceased questioning the defendant after he made the comment about talking to an attorney. However, while a couple of the officers and the defendant were engaged in casual conversation over a sandwich, Trooper Baumgard asked the defendant if something was bothering him, and the defendant replied that he was embarassed (SHT 240). Trooper Zimmerman said, "Embarassed about what, . . . well, we'll just wait until we are done eating before we talk about anything." After they finished eating, the defendant said, "Go ahead, what do you want to know." This offer of information was initiated by the defendant and made in response to Trooper Baumgard's statement that "we can't spoonfeed you". The defendant then made the inculpatory statement, "I pulled the trigger."

Once a suspect invokes the right to counsel all questioning must stop until counsel is obtained or provided *unless the accused initiates further communication, exchanges or conversations with the police.* (Emphasis ours.) *Edwards v. Arizona*, 457 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 46, 112 L.Ed.2d 49 (1990); and *Commonwealth v. Santiago*, 528 Pa. 516, 599 A.2d 200 (1991). The defendant herein had been warned on several occasions of his right to counsel, yet chose to respond to the officer's open-ended remark by declaring that he pulled the trigger. At that point he was given another *Miranda* warning,

waived his rights [3], and proceeded to give a detailed written statement of the events which transpired on the day Ms. Auckerman was killed. After carefully reviewing all of the circumstances, we find that the defendant fully understood his rights under *Miranda* yet voluntarily chose to confess his crime to the police. Accordingly, the defendant's motion to suppress the inculpatory statements are denied.

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[3] Commonwealth Exhibit #6 is a photocopy of the *Miranda* warnings and waiver form signed by the defendant (SHT 316-18).

APPENDIX C

IN THE COURT OF COMMON PLEAS
OF WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

OTN E9934072
CO# 3290C94

COMMONWEALTH

VS.

ROGER J. WOO

ORDER OF COURT/SENTENCE

NOW 3/27, 1996, THE ACTOR IS ORDERED TO:

Deft. is sentenced to at this time (5:44) at Ct. 1—life imprisonment at appropriate State Facility w/in the Bureau of Corrections.

BY THE COURT,

Richard M. McCormick, Jr.
Judge

APPENDIX D

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 498 W.D. Alloc. Dkt. 1997

COMMONWEALTH OF PENNSYLVANIA,
Respondent,

v.

ROGER J. WOO,
Petitioner.

Petition for Allowance of Appeal from the Order and Memorandum Opinion of the Superior Court

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ORDER

PER CURIAM

AND NOW this 31st day of December, 1997, the Petition for Allowance of Appeal is DENIED.

[December 31, 1997]

APPENDIX E

IN THE COURT OF COMMON PLEAS
OF WESTMORELAND COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

No. 3290-1994

COMMONWEALTH OF PENNSYLVANIA

vs.

ROGER JIUNNMING WOO

OMNIBUS PRETRIAL MOTIONS

AND NOW, this 22nd day of MARCH, 1995, comes the above named defendant, Roger Jiunnming Woo, by and through his attorney, Thomas R. Ceraso, and files the following pretrial motions pursuant to Rules 305 and 306 of the Pa. R.Cr.P., and other motions which are within the inherent power of this court to grant and are required to be heard and granted in the interest of justice.

* * * *

MOTION TO SUPPRESS EVIDENCE

Roger Jiunnming Woo, defendant, by his attorney, THOMAS R. CERASO, Esquire, moves your Honorable Court for an Order suppressing certain evidence pursuant to Rule 306, R.Cr.P., and in support thereof, represents as follows:

1. Subsequent to September 18, 1994, the defendant became the focus of an investigation by the Pennsylvania State Police relative to the homicide charges set forth in this matter and in a related matter, which was also the

subject of a criminal complaint. A copy of that criminal complaint being attached, made a part hereof and marked Exhibit "B".

2. On various dates and at various times, interviews were conducted by law enforcement officials of the defendant, including but not ilmited to a number of statements obtained on September 23, 1994, there being both oral and written statements taken from the defendant.

3. All statements and admissions, whether written or oral, of the defendant were taken in custodial settings and requirements.

4. Because of the circumstances involved in the taking of the various statements, there should have been voluntary, knowing or intelligent waiver of rights as expressed in Miranda and there were statements taken that not only were not voluntary, knowing and intelligent with regard to waiver of rights expressed in Miranda but, in fact, were taken with no Miranda warnings having been afforded the defendant.

5. In addition to the matters set forth in the previous paragraph, there came a time when the defendant requested counsel but following such request, additional interviews were conducted and statements and admissions were obtained.

6. All of the interviews, statements and admissions obtained were obtained as a result of improper actions on the part of law enforcement officials in violation of either or both the Constitutions of the Commonwealth of Pennsylvania and the United States of America particularly with regard to defendant's 5th Amendment privileges to the United States Constitution and Article 1, § 9 of the Pennsylvania Constitution.

WHEREFORE, defendant moves your Honorable Court for an Order suppressing any statements or admissions, whether the same be of a testimonial nature or whether the same be statements and admissions or any other evi-

dence obtained which came about as the result of said statements and admissions, and further, defendant through his counsel, moves your Honorable Court to set a hearing date to determine all of the matters set forth in this Omnibus Pretrial Motion.

Respectfully submitted:

/s/ Thomas R. Ceraso
THOMAS R. CERASO, ESQUIRE
Attorney for Defendant.
126 North Maple Avenue
Greensburg, PA. 15601